

E-Filed on 7/16/2009

1 PITE DUNCAN, LLP
STEVEN W. PITE (NV Bar #008226)
2 EDDIE R. JIMENEZ (NV Bar #10376)
4375 Jutland Drive, Suite 200
3 P.O. Box 17933
San Diego, CA 92177-0933
Telephone: (858) 750-7600
4 Facsimile: (619) 590-1385
E-mail: ecfnvb@piteduncan.com

5 ABRAMS & TANKO, LLP
6 MICHELLE L. ABRAMS (NV Bar #005565)
3085 S. Jones Blvd., Suite C
7 Las Vegas, NV 89146

8 Attorneys for Secured Creditor WACHOVIA MORTGAGE, FSB, F.K.A. WORLD SAVINGS
9 BANK

10 UNITED STATES BANKRUPTCY COURT
11 DISTRICT OF NEVADA

12 In re

13 JOHN E. ALBRIGHT AND ELVINA L.
14 ALBRIGHT,

15 Debtor(s).

Bankruptcy Case No. BK-N-09-51368-gwz
Chapter 7

WACHOVIA MORTGAGE, FSB, F.K.A.
WORLD SAVINGS BANK'S MOTION
FOR RELIEF FROM AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

Date: August 11, 2009
Time: 10:00 a.m.

18 Wachovia Mortgage, FSB, f.k.a. World Savings Bank ("Movant"), moves this court for an
19 order terminating the automatic stay of 11 United States Code § 362 as to Movant, so that Movant
20 may commence and continue all acts necessary to enforce its security interest in real property
21 generally described as 1526 North Court, Gardnerville, Nevada 89410.

22 On or about May 6, 2009, John E. Albright and Elvina L. Albright ("Debtors") filed a
23 voluntary petition under Chapter 7 of the Bankruptcy Code, and Marianne Eardley was appointed as
24 Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtors and the
25 bankruptcy estate are stayed as provided in 11 United States Code § 362.

26 Movant moves this court for relief from stay under 11 United States Code §§ 362(d)(1) and
27 362(d)(2).

28 /././

MEMORANDUM OF POINTS AND AUTHORITIES

I.

**MOVANT IS ENTITLED TO RELIEF FROM THE
AUTOMATIC STAY UNDER 11 UNITED STATES CODE
§ 362(d)(2).**

NO EQUITY

11 United States Code § 362(d)(2) provides that relief from the automatic stay shall be granted if the debtor does not have any equity in the property and the property is not necessary to the debtor's effective reorganization.

In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that: § 362(d)(2) reflects congressional intent to allow creditors to immediately proceed against the property where the debtor has no equity and it is unnecessary to the reorganization, even where the debtor can provide adequate protection under § 362(d)(1). (Emphasis added).

Id. at 610 (emphasis added).

In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all encumbrances are totalled, whether or not all the lienholders have joined in the request for relief from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir. 1984).

An appropriate cost of sale factor should also be added to determine if the debtor has any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289 (Bankr. S.D. Cal. 1982).

On or about December 6, 2004, Debtors, for valuable consideration, made, executed and delivered to Movant a Note in the principal sum of \$220,500.00 (the "Note"). Pursuant to the Note, Debtors are obligated to make monthly principal and interest payments commencing February 1, 2005, and continuing until January 1, 2035, when all outstanding amounts are due and payable. The Note provides that, in the event of default, the holder of the Note has the option of declaring all unpaid sums immediately due and payable. A true and correct copy of the Note is attached hereto as exhibit B and incorporated herein by reference.

1 On or about December 6, 2004, the Debtors made, executed and delivered to Movant a Deed
2 of Trust (the "Deed of Trust") granting Movant a security interest in real property commonly
3 described as 1526 North Court, Gardnerville, Nevada 89410 (the "Real Property"), which is more
4 fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
5 incurred as a result of the Debtors' bankruptcy case may be included in the outstanding balance
6 under the Note. The Deed of Trust was recorded on December 8, 2004, in the Official Records of
7 Douglas County, State of Nevada. A true and correct copy of the Deed of Trust is attached hereto as
8 exhibit C and incorporated herein by reference.

9 The obligation under the Note is in default as of February 1, 2009, for failure to make
10 payments to Movant. As of June 12, 2009, the total obligation due and owing under the Note is in
11 the approximate amount of \$238,558.50, representing the principal balance of \$232,105.24, interest
12 in the sum of \$5,816.53, late charges in the amount of \$288.52, escrow advances in the amount of
13 \$283.21, and total fees of \$65.00. This is an approximate amount for purposes of this Motion only,
14 and should not be relied upon as such to pay off the subject loan as interest and additional advances
15 may come due subsequent to the filing of the Motion. An exact payoff amount can be obtained by
16 contacting Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees
17 and costs in bringing the instant Motion. Moreover, the total arrears under the Note are in the
18 approximate sum of \$7,137.60, excluding the post-petition attorneys' fees and costs incurred in filing
19 the instant Motion. Movant's Information Sheet as to the extent of liens and encumbrances against
20 the Real Property is attached hereto as exhibit A and incorporated herein by reference.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **II.**

2 **RELIEF FROM STAY**

3 **LACK OF EQUITY**

4 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
5 Statements, the fair market value of the Property is approximately \$210,000.00. True and correct
6 copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached hereto as
7 exhibit D and incorporated herein by reference.

8 Based on the above, Movant maintains that the equity in the Property is as follows:

| | |
|----------------------------|--------------------|
| 9 Fair Market Value: | \$210,000.00 |
| 10 Less: | |
| Movant's Trust Deed | \$238,558.50 |
| Costs of Sale (8%) | <u>\$16,800.00</u> |
| 11 Equity in the Property: | \$<45,358.50> |

12 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
13 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
14 relief from the automatic stay pursuant to 11 United States Code § 362(d)(2).

15 Debtors' Statement of Intent indicates it is the intent of the Debtors to surrender the Real
16 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtors'
17 Statement of Intent is attached as exhibit E and incorporated herein by reference.

18 **III.**

19 **MOVANT IS ENTITLED TO RELIEF FROM THE**
20 **AUTOMATIC STAY UNDER 11 UNITED STATES CODE**
§ 362(d)(1).

21 **CAUSE - LACK OF ADEQUATE PROTECTION**

22 Pursuant to the provisions of 11 United States Code §§ 361 and 362(d)(1), Movant is entitled
23 to adequate protection of its interest in the Property.

24 Movant submits that adequate protection in this case requires normal and periodic cash
25 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
26 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

27 ///
28 ///
29 ///

1 Movant is informed and believes that Debtors are presently unwilling or unable to provide
2 adequate protection to the Movant and there is no probability that adequate protection can be
3 afforded to Movant within a reasonable time.

4 By reason of the foregoing, Movant is entitled to relief from stay under 11 United States
5 Code § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

6 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

7 1. Terminating the automatic stay of 11 United States Code § 362, as it applies to the
8 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

9 2. That the 10-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

10 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
11 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
12 the Property;

13 4. Permitting Movant to offer and provide Debtors with information re: a potential
14 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
15 Mitigation Agreement, and to enter into such agreement with Debtors;

16 5. Alternatively, in the event this court declines to grant Movant the relief requested
17 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
18 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
19 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay
20 when due (a) the monthly installments of principal and interest, as required under the Note;
21 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to
22 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
23 filing of this motion;

24 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
25 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;

26 7. That the requirements of Local Rule 9021 be waived; and

27 ///

28 ///

1 8. For such other and further relief as the court deems just and proper.

2
3 Dated: June 23, 2009

/s/ Eddie R. Jimenez
 4375 Jutland Drive, Suite 200
 P.O. Box 17933
 San Diego, CA 92177-0933
 (858) 750-7600
 NV Bar # 10376
 Attorney for WACHOVIA
 MORTGAGE, FSB, F.K.A.
 WORLD SAVINGS BANK